

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

December 30, 2004

IN RE:

PETITION OF KING'S CHAPEL CAPACITY, LLC FOR
CERTIFICATE OF CONVENIENCE AND NECESSITY
TO SERVE AN AREA IN WILLIAMSON COUNTY,
TENNESSEE KNOWN AS ASHBY COMMUNITY

DOCKET NO.
04-00335

ORDER DENYING MOTION TO RECONSIDER OR IN THE ALTERNATIVE
MOTION FOR INTERMEDIATE RELIEF

This matter came before the Hearing Officer upon the *Motion to Reconsider or in the Alternative Motion for Intermediate Relief* ("Motion") filed by King's Chapel Capacity, LLC ("King's Chapel") on December 20, 2004. In its *Motion*, King's Chapel requested reconsideration of the Hearing Officer's December 17, 2004 *Order Granting Motion to Hold Procedure in Abeyance* ("Order"), or in the alternative, requested that the Authority approve a third-party wastewater provider to finish construction and to provide wastewater services until the Chancery Court decides the contractual rights of Tennessee Wastewater Systems, Inc. ("TWS") and King's Chapel. TWS filed the *Response of Tennessee Wastewater to Motion to Reconsider or, in the Alternative, Motion for Intermediate Relief* ("Response") on December 22, 2004, in which it opposed both the reconsideration of the *Order* and the alternative request for intermediate relief. The parties presented oral arguments before the Hearing Officer on

December 28, 2004. After consideration of the filings and arguments of the parties and for the reasons discussed below, the *Motion* is denied.

BACKGROUND

The procedural history of this matter is more fully discussed in the *Order* issued on December 17, 2004. Briefly, on October 5, 2004, King's Chapel filed an application for a Certificate of Public Convenience and Necessity ("*Petition*") to operate wastewater disposal systems in the Ashby Community development in Williamson County, Tennessee ("the subdivision"). On October 11, 2004, TWS filed a petition to intervene in this docket, which was granted by the voting panel assigned to this docket at a regularly scheduled Authority Conference held on November 22, 2004.¹ At a status conference held on November 29, 2004, the Hearing Officer established a procedural schedule to completion of the docket and granted the request for an expedited hearing in part by setting the matter for a hearing before the panel following the regularly scheduled Authority Conference in January 2005.²

On December 2, 2004, TWS filed its *Motion to Hold Proceedings in Abeyance*. TWS asserted that it entered into a contract with the developer of the subdivision in which the developer agreed to pay for the construction of the sewer system and the parties agreed that TWS would repair and maintain the system. In addition, TWS claimed that the contract incorporated by reference local regulations which require that, once the system is complete, the land and easements on which it sits will be conveyed to the system operator, which it alleged was TWS. TWS further alleged that the system was substantially complete but that the developer failed to pay the contract amount or to turn the land and easements over to TWS. TWS sued King's

¹ See Transcript of Authority Conference, pp 26-29 (November 22, 2004)

² See *Order Establishing Procedural Schedule*, p 3 (December 3, 2004)

Chapel and others in the Chancery Court of Williamson County, Tennessee for damages, declaratory relief and injunctive relief. Count III of the complaint asked for a declaratory ruling that TWS is the owner of the sewer system. As a result of the pending complaint, TWS asserted that the TRA should postpone further action on King's Chapel's *Petition* pending the outcome of the suit. TWS argued that, pursuant to Tenn. Code Ann. § 65-4-203(a) (2004)³, the Authority cannot issue a certificate authorizing a new utility to compete with an existing one unless the Authority first finds that the facilities of the existing system are inadequate to meet the needs of the public or that the incumbent utility refuses or neglects or is unable to make such additions as needed to provide service. TWS also stated that there were ongoing proceedings at the Tennessee Department of Environment and Conservation ("TDEC") which would affect the *Petition*. Specifically, King's Chapel filed an application with TDEC for a state operating permit to provide service to the subdivision.⁴ TWS held a state operating permit to provide service to the subdivision, but TDEC had stated its intention to pursue termination of the permit of TWS.⁵

On December 9, 2004, King's Chapel filed the *Response of King's Chapel Capacity, LLC to Motion to Hold Proceedings in Abeyance*, in which it asserted that although the subdivision was within the service area for which TWS was granted a Certificate of Convenience and

³ Tenn Code Ann § 65-4-203(a) (2004) reads.

(a) The Authority shall not grant a certificate for a proposed route, plant, line, or system, or extension thereof, which will be in competition with any other route, plant, line, or system, unless it shall first determine that the facilities of the existing route, plant, line, or system are inadequate to meet the reasonable needs of the public, or the public utility operating the same refuses or neglects or is unable to or has refused or neglected, after reasonable opportunity after notice, to make such additions and extensions as may reasonably be required under the provision of this part

⁴ See *Motion to Hold Proceedings in Abeyance*, p. 5, fn. 6 (December 2, 2004)

⁵ See Letter to John Powell from Edward Polk, Manager, Permit Section, Division of Water Pollution Control, p. 1 (October 21, 2004)

Necessity ("CCN"),⁶ TWS neither owned nor operated any facility capable of serving the subdivision. In addition, King's Chapel asserted that although the developers paid monies to TWS to construct the sewer system, no final agreement was reached and no contract was executed. King's Chapel alleged that the contract submitted to the Authority and on which the Chancery Court suit relied was a forgery. King's Chapel asserted that Tenn. Code Ann. § 65-4-203(a) (2004) did not apply to the facts in this case because TWS did not own the system and had not offered any proof that it owned the system. Further, King's Chapel argued that the determination of contract damages in the Chancery Court had no bearing on whether it was best suited to operate the sewer system it paid to have built and currently owned.

After considering the arguments above, the Hearing Officer issued the *Order Granting Motion to Hold Procedure in Abeyance* on December 17, 2004, finding that Tenn. Code Ann. § 65-4-203(a) (2004) requires the Authority to make a determination as to the adequacy of the existing facilities to meet the reasonable needs of the public before granting a certificate to a competitor. Because TWS asserted that the *Petition* should be evaluated pursuant to Tenn. Code Ann. § 65-4-203(a) (2004) and King's Chapel asserted that the statute did not apply, the Authority could not move forward with proceedings to approve or deny King's Chapel's *Petition* until it determined whether that statute should be used to evaluate that *Petition*. However, the Authority could not determine the applicability of Tenn. Code Ann. § 65-4-203(a) (2004) until it determined if one of the parties was an incumbent and one of the parties was a competitor pursuant to the terms of that statute. Because the Authority could not determine the respective status of the parties until the Chancery Court determined who owned the sewer system and

⁶ See *In re Petition of On-Site Systems, Inc to Amend Its Certificate of Convenience and Necessity*, Docket No 97-01393, *Order Approving Petition of On-Site Systems, Inc to Amend Its Certificate of Convenience and Necessity for Expansion of Service Area* (March 31, 1998) TWS was formerly known as On-Site Systems, Inc

TDEC determined who would ultimately possess a state operating permit to provide service to the subdivision, the dispute over the ownership of the sewer system being litigated in the Chancery Court, coupled with the uncertainty over which party ultimately will possess a state operating permit from TDEC, served to render any evaluation of the *Petition* by the Authority premature until these issues were resolved. As a result, the docket was ordered to be held in abeyance pending 1) the award or refusal to award to King's Chapel a state operating permit by TDEC and the decision by TDEC whether or not to terminate the permit of TWS; and 2) the dismissal of Count III of the Complaint or the determination of the ownership of the sewer system by the Chancery Court in Williamson County. The parties were directed to file with the Authority any decision by TDEC concerning the issuance or termination of the state operating permit of either party to provide service to the subdivision and any decision by the Chancery Court either dismissing Count III of the Complaint or determining the ownership of the sewer system. This *Order* is the subject of the *Motion to Reconsider or in the Alternative Motion for Intermediate Relief* filed by King's Chapel on December 20, 2004.

THE MOTION FOR RECONSIDERATION OR IN THE ALTERNATIVE MOTION FOR INTERMEDIATE RELIEF AND RESPONSE

In its *Motion*, King's Chapel states as grounds for its request for reconsideration that the Authority should address the delay to 48 lot owners⁷ who cannot close on their property or begin construction until sewer service is established and should address the costs of approximately \$25,000 per month to King's Chapel as the result of not being able to move forward with the development. King's Chapel asserts that these costs and delays to King's Chapel and the lot

⁷ In its *Response*, TWS questions whether there can be lot owners in existence since the development has not received final approval from Williamson County. See *Response of Tennessee Wastewater to Motion to Reconsider or, in the Alternative, Motion for Intermediate Relief*, p. 2, fn. 2 (December 22, 2004). In the *Motion*, King's Chapel states that the 48 lot owners "cannot close on their property," indicating they are not yet actual owners of the lots. See *Motion*, p. 1 (December 20, 2004).

owners are unduly burdensome. In the alternative, King's Chapel requests intermediate relief from the TRA through the Authority's approval of a third-party wastewater provider⁸ to finish construction and to provide wastewater services, if necessary, until the Williamson County Chancery Court decides the contractual rights of TWS and King's Chapel. During oral argument, King's Chapel cited as support for its proposal that the TRA has a duty to serve and protect the public and urged the Authority to address the equities of the situation. King's Chapel suggested that a temporary CCN be granted to a third-party wastewater provider and that, because there is no lien or claim against the property, title or an easement could be conveyed from King's Chapel or its agent to a third-party provider without the necessity of an order from the TRA directing it to do so. Further, King's Chapel argued that this proposal would help the parties to avoid additional litigation over who would bear the costs of the losses King's Chapel asserts it is incurring.

In its *Response*, TWS argues that the *Motion* does not address the reasons stated in the *Order* for holding the docket in abeyance and instead is founded entirely on the claim that any delay resulting from the contract dispute will cause financial harm, not to King's Chapel, but to the developers. TWS contends that the *Motion* does not dispute the conclusion contained in the *Order* that the TRA cannot carry out its statutory responsibilities until the matters which are the subject of proceedings in other forums are resolved. In addition, TWS opposes the request that a third party be authorized to complete and operate the system pending a final decision by the TRA on the *Petition*. TWS states that any delay in the developers' project is due to the developers' own refusal to abide by the contract and that TWS is competent to build and operate the system

⁸ During oral argument, King's Chapel suggested Cartwright Creek, LLC, which provides service nearby, as an example of a possible third-party provider

as soon as the developers fulfill their contractual obligations. TWS also asserts that until the ownership of the system is resolved, the Authority cannot determine how to apply Tenn. Code Ann. § 65-4-203(a) (2004) and cannot lawfully grant the alternative relief sought by King's Chapel. TWS argues that, even if the Authority could circumvent Tenn. Code Ann. § 65-4-203(a) (2004) and give another company a temporary license to operate the system, there would be practical problems that would involve the Authority in a morass of tangential, operational issues.

FINDINGS AND CONCLUSIONS

The basis of the December 17, 2004 *Order* holding this matter in abeyance was that the Authority cannot move forward with its consideration of King's Chapel's *Petition* pursuant to Tenn. Code Ann. § 65-4-203(a) (2004) until the ownership of the sewer system is determined. That determination will be made by the Williamson County Chancery Court through the resolution of the pending suit involving the parties. In addition, there is uncertainty over which party would ultimately possess a state operating permit from TDEC. In support of its request for reconsideration of that *Order*, King's Chapel argues that the Authority should address the delay to the lot owners who cannot close on their property or begin construction until sewer service is established and should address the costs incurred as the result of the delay. Although the delay and resulting costs cited by King's Chapel are no doubt burdensome to the developers and to the lot owners or potential lot owners, King's Chapel has not demonstrated how consideration of those burdens will impact or change the Authority's ability to determine whether or how to apply the provisions of Tenn. Code Ann. § 65-4-203(a) (2004) to its *Petition* so that this matter may move toward a resolution. Nor has King's Chapel demonstrated through its filings or arguments that the analysis or conclusions contained in the *Order* are incorrect or are in need of further

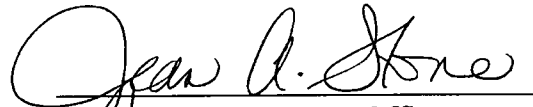
clarification. As a result, the Hearing Officer concludes that King's Chapel's request for reconsideration of the *Order Granting Motion to Hold Procedure in Abeyance* should be denied.

In the alternative, King's Chapel has requested the Authority to approve a third-party wastewater provider to finish construction of the sewer system and to provide wastewater services on a temporary basis until the Chancery Court decides the contractual rights of TWS and King's Chapel. King's Chapel has stated as support for its proposal that the TRA has a duty to serve and protect the public and has urged the Authority to address the equities of the situation.

While King's Chapel's proposal perhaps would ease the problems caused to the developers and lot owners or potential lot owners by the delay in consideration of the *Petition*, the Hearing Officer agrees with TWS that the TRA is created by statute and has no powers or authority beyond those granted to it by the General Assembly. King's Chapel has not cited to, and the Hearing Officer is unaware of, any statute that empowers the Authority to grant equitable relief. King's Chapel has not demonstrated that the TRA may act to protect the public interest in any manner except through the exercise of its statutory powers. Nor has King's Chapel demonstrated how the relief requested would further the public interest beyond the financial interests of the developers or lot owners. Further, King's Chapel has not cited any statute that would allow the Authority to appoint an interim third-party provider outside of the CCN application process as it proposed in its request for intermediate relief, nor is there a CCN application from a third-party provider properly before the Authority. In sum, the Hearing Officer finds that King's Chapel has failed to demonstrate that the Authority can lawfully grant the intermediate relief requested. As a result, King's Chapel's request for intermediate relief is denied.

IT IS THEREFORE ORDERED THAT:

1. The *Motion to Reconsider or in the Alternative Motion for Intermediate Relief* filed by King's Chapel Capacity, LLC is denied; and
2. The Hearing Officer's December 17, 2004 *Order Granting Motion to Hold Procedure in Abeyance* is unmodified and remains in effect.


Jean A. Stone, Hearing Officer